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7 UNITED STATES DISTRICT COURT  
8 DISTRICT OF NEVADA  
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10 HYRUM JOSEPH WEST,

11 Plaintiff,

12 v.

13 BRIAN WILLIAMS, *et al.*,

14 Defendants.  
15

Case No. 2:15-cv-1504-LDG (NJK)

**ORDER**

16 Presently before the Court is a habeas corpus proceeding under 28 U.S.C. §2254  
17 brought by Hyrum Joseph West, a Nevada State prisoner.

18 Procedural Background<sup>1</sup>

19 As previously summarized by the Court, in June 2011, a jury found West guilty of  
20 trafficking a Schedule 1 controlled substance following a trial in Nevada's Fifth Judicial  
21 District Court. Prior to sentencing, West filed a motion for mistrial. At West's sentencing  
22 hearing, the court denied the motion and sentenced West to a prison term of 10 to 25  
23 years. West then filed a motion for a new trial.  
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26 <sup>1</sup> The Court has compiled the procedural history from the exhibits filed at ECF  
Nos. 17-22 and this Court's own docket.

1 The state district court entered a judgment of conviction on December 30, 2011, and  
2 an order denying the motion for new trial on March 20, 2012. West appealed. The Nevada  
3 Supreme Court remanded the matter for a written disposition of the court's order denying  
4 West's pretrial motions to dismiss and to suppress.

5 On December 13, 2012, the Nevada Supreme Court affirmed West's conviction.  
6 West filed a separate appeal of the state district court's written order denying his motion to  
7 dismiss and motion to suppress. On January 24, 2013, the Nevada Supreme Court  
8 dismissed the appeal for lack of jurisdiction.

9 On November 12, 2013, West filed a proper person state habeas petition and  
10 supporting memorandum. He filed a counseled supplemental petition on June 25, 2014.  
11 On October 21, 2014, the state court entered an order denying some of West's claims on  
12 the merits and finding his remaining claims procedurally barred pursuant to Nev. Rev. Stat.  
13 §34.810. West appealed.

14 On April 15, 2015, the Nevada Court of Appeals affirmed the denial of most of  
15 West's claims on the merits, but dismissed one ground as procedurally barred pursuant to  
16 Nev. Rev. Stat. 34.810, and declined to address additional claims on the ground that West  
17 failed to support them with any cogent arguments.

18 On May 7, 2015, before remittitur issued on the appeal, West filed a petition for writ  
19 of mandamus with the Nevada Supreme Court in which he sought an evidentiary hearing  
20 on his state habeas petition. The Nevada Supreme Court declined to exercise its original  
21 jurisdiction and denied mandamus. The court also denied West's petition for rehearing.

22 Prior to the conclusion of his state proceedings, on or about July 31, 2015, West  
23 initiated his federal habeas petition, in which he raised six grounds along with a lengthy  
24 supporting memorandum and exhibits, by mailing or handing the petition to a correctional  
25 officer for the purpose of mailing the petition to this Court. Respondents moved to dismiss  
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1 the petition, arguing that the claims were unexhausted, procedurally barred or not  
2 cognizable.

3 On September 28, 2016, this Court granted the motion to dismiss, but also granted  
4 West leave to amend his petition to address several deficiencies in the initial petition. On  
5 November 1, 2016, West filed an amended federal petition (CM/ECF No. 33) and a  
6 memorandum in support (CM/ECF No. 34). Respondents again moved to dismiss the  
7 amended petition, again arguing that West's claims were unexhausted, procedurally barred  
8 or not cognizable. This Court granted the motion in part, determining that West had  
9 included many unexhausted claims in the amended federal habeas petition, and that to the  
10 extent that West had exhausted Grounds 1, 2, 3, and 4 of his amended petition, those  
11 grounds for relief were not cognizable under *Stone v. Powell*, 428 U.S. 465 (1975).<sup>2</sup>

12 As West had included unexhausted claims in his amended federal petition, thus  
13 presenting the Court with a mixed petition, the Court provided West the opportunity to  
14 either (1) abandon his unexhausted claims and proceed on the remaining claims, or (2)  
15 request that the proceedings be stayed and held in abeyance while he exhausted his state  
16 court remedies as to the unexhausted claims. The Court notified West that the latter option  
17 required that such a request be filed as a motion and that he make the necessary showing  
18 to stay a mixed petition under *Rhines v. Weber*, 544 U.S. 269 (2005).

19 West moved for a stay and abeyance of his amended federal petition. The Court  
20 denied that motion, finding that West had not met his burden of demonstrating good cause  
21 for his failure to exhaust his unexhausted claims, as required under *Rhines*. The Court  
22 provided West an opportunity to abandon his unexhausted claims and proceed with his  
23 exhausted claims. The Court notified West that, if he failed to do so, the Court would be  
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25 <sup>2</sup> The Court further noted that, to the extent West was alleging a Fourth  
26 Amendment violation in Grounds 5, 7, and 12, any such Fourth Amendment claims raised  
in those grounds for relief were also barred by *Stone v. Powell*.

1 required to dismiss the entire petition under *Rose v. Lundy*, 455 U.S. 509 (1982) as a  
2 mixed petition. After West filed an abandonment of his unexhausted claims, respondents  
3 filed an answer (CM/ECF No. 70) to the remaining exhausted claims. West has filed a  
4 response (CM/ECF No. 72) to that answer.

5 Factual Background.

6 The state presented the following evidence at trial. Sometime prior to the early  
7 morning hours of July 10, 2010, Detective Meade, who worked in the Nye County Sheriff's  
8 Office's narcotics unit, developed West as a target involved in the trafficking of  
9 methamphetamine. After receiving a call from a Las Vegas Metropolitan police officer,  
10 Detective Meade went to the highway from Las Vegas to Pahrump "in anticipation of Hyrum  
11 West returning back to Pahrump from Las Vegas," along with another detective and a  
12 couple of patrol officers.

13 One of the patrol officers, Deputy Otteson, spotted West's vehicle. Using a radar  
14 unit, she established that the vehicle was traveling 59 m.p.h. in a 55 m.p.h. zone. Deputy  
15 Otteson conveyed this information to the other law enforcement officers by radio. Based  
16 on that information, Deputy Zaragoza conducted a traffic stop of the vehicle West was  
17 driving.

18 After arriving at the location where West was stopped, Deputy Otteson asked West  
19 whether he consented to a search of the vehicle, to which he said, "Yes." Deputy Hunt, a  
20 canine deputy, did an external search of the vehicle with his canine partner, Indy. Indy  
21 alerted to the odor of a controlled substance on the driver's side door of the vehicle and on  
22 a clear package containing currency. Detective Meade then conducted a search of the  
23 vehicle, finding two blue pouches that contained a substance he suspected was  
24 methamphetamine. The blue pouches were hidden in the gear shift box. Subsequent  
25 testing confirmed that the substance was slightly more than 215 grams of  
26 methamphetamine. Several days later, Detective Meade interviewed West. West

1 specifically discussed the quantity and quality of the methamphetamine that Detective  
2 Meade had seized from West's car.

### 3 Analysis

4 This matter is governed by the Anti-Terrorism and Effective Death Penalty Act of  
5 1996 (AEDPA). Under the AEDPA, federal courts cannot grant habeas relief when a state  
6 court has adjudicated a claim on its merits unless the state court adjudication "(1) resulted  
7 in a decision that was contrary to, or involved an unreasonable application of, clearly  
8 established Federal law, as determined by the Supreme Court of the United States; or (2)  
9 resulted in a decision that was based on an unreasonable determination of the facts in light  
10 of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). To obtain  
11 relief, a petitioner must do more than show that "the relevant state-court decision applied  
12 clearly established federal law erroneously or incorrectly." *Williams v. Taylor*, 529 U.S.  
13 362, 411 (2000). Instead, a petitioner must show that the state court's rejection of the  
14 claim was "so lacking in justification that there was an error well understood and  
15 comprehended in existing law beyond any possibility for fairminded disagreement."  
16 *Harrington v. Richter*, 562 U.S. 86, 103(2011). In making this determination, the state  
17 courts' factual findings are entitled to the presumption of correctness. 28 U.S.C. §  
18 2254(e)(1).

### 19 Ground Six.

20 West asserts his stop was recorded by the camera and video recording system in  
21 Deputy Zaragoza's patrol car. This video recording would have both shown that he was  
22 still in a 65 m.p.h. zone when Deputy Zaragoza initiated the traffic stop for speeding in a 55  
23 m.p.h. zone, and that he did not consent to a search of his vehicle in response to Deputy  
24 Otteson. He argues that the State violated *Brady v. Maryland*, 373 U.S. 83, 87 (1963), by  
25 failing to disclose the video recording. He contends that, because he is alleging a *Brady*  
26 violation, he does not have to show that the State acted in bad faith because such a

1 “violation occurs when the government fails to disclose evidence materially favorable to the  
2 accused.” *Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006).

3 The Court previously determined that West exhausted his claim that the State  
4 suppressed or destroyed material exculpatory evidence in violation of his constitutional  
5 rights.<sup>3</sup> The specific evidence he claims was destroyed or suppressed was the video  
6 recording of the traffic stop and arrest, as recorded by the dashcam video recorder  
7 installed in Deputy Zaragoza’s patrol car.

8 During the preliminary hearing, Deputy Zaragoza testified that his patrol vehicle had  
9 video recording equipment and that he believed the equipment was operational. In  
10 response to defense counsel’s questions, Deputy Zaragoza indicated he did not have a  
11 videotape of the stop because he “didn’t think to put it in evidence.” When questioned  
12 whether the video recording existed, Deputy Zaragoza indicated he would need “to look  
13 through the videotapes, sir.”

14 West later learned that the recording of the stop on the video tape in Deputy  
15 Zaragoza’s patrol car had apparently been recorded over. In response, he moved to  
16 dismiss the case based upon the destruction of, or failure to preserve, evidence. During  
17 the resulting evidentiary hearing, Deputy Zaragoza testified that the videotape containing  
18 the recording of the stop had still been in his patrol car. When he attempted to review the  
19 recording of the stop on that tape, he discovered that “the dates were not concurrent with  
20 the video. It would have one date here, and it would skip and have a different date.” He  
21 further testified the only time he had touched the video tape was when he received it as a  
22 blank tape and had placed it in the video equipment in the car. He testified, based on his  
23 notation on the tape, that he had placed the tape into the equipment on January 22, 2010,  
24 and that he had never replaced that tape. He indicated that the equipment should have

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25 <sup>3</sup> West asserts the destruction of the video recording was intentional “or, at the  
26 very least, inadvertantly allowed to be destroyed.”

1 notified him when the tape was full. The state also provided testimony indicating that the  
2 equipment, if it had functioned as intended, would have only recorded on blank tape and  
3 would not have recorded over previously-recorded tape. A portion of the tape was played,  
4 which showed a video recording made August 2, 2010, then a jump to a video recording  
5 made on July 10, 2010, of the stop of West's vehicle. This recording was extremely short,  
6 and then the recording on the videotape again jumped to a different date. The state  
7 proffered that the remainder of the tape was consistent, with recordings constantly jumping  
8 between different dates until the tape was removed from the vehicle in October 2010.

9       The trial court denied West's motion to dismiss based upon the destruction or failure  
10 to preserve evidence, which motion argued, in part, that failure to preserve the video  
11 recording violated *Brady*. The trial court found that Deputy Zaragoza's video recording  
12 system was malfunctioning at the time of the stop, that the videotape record of the traffic  
13 stop in question and other traffic stops was in disarray and unintelligible, and that Deputy  
14 Zaragoza did not purposely destroy the videotape evidence of West's stop. The trial court  
15 concluded that there was no evidence that the videotape evidence of the traffic stop was  
16 destroyed in bad faith.

17       West appealed the trial court's denial of his motion to dismiss. The Nevada  
18 Supreme Court reviewed the trial court's decision for abuse of discretion and affirmed. It  
19 noted that the "failure to preserve potentially exculpatory evidence may result in dismissal  
20 of charges if the defendant can show bad faith or connivance on the part of the  
21 government or that he was prejudiced by the loss of the evidence." The Nevada Supreme  
22 Court concluded that "the record on appeal supports the district court's factual findings"  
23 and that "West has failed to demonstrate that the State acted in bad faith or that he was  
24 prejudiced by the loss of the videotape." Accordingly, the Nevada Supreme Court  
25 determined that the trial court had not abused its discretion in denying West's motion to  
26 dismiss.

1 West's argument rests on the premise that the Nevada Supreme Court's decision  
2 was "contrary to, or involved an unreasonable application of, clearly established Federal  
3 law, as determined by the Supreme Court of the United States" because it did not apply  
4 *Brady* in reviewing his appeal. The Supreme Court held in *Brady* that "the suppression by  
5 the prosecution of evidence favorable to the accused upon request violates due process  
6 where the evidence is material either to guilt or to punishment, irrespective of the good faith  
7 or bad faith of the prosecution." 373 U.S. at 87. As such, he argues the Nevada Supreme  
8 Court erred by applying a bad faith requirement. West's argument ignores, however, that  
9 the Supreme Court has recognized that a different standard applies to a State's failure to  
10 preserve potentially useful evidence, rather than the suppression of favorable evidence.  
11 As stated by the Supreme Court, "unless a criminal defendant can show bad faith on the  
12 part of the police, failure to preserve potentially useful evidence does not constitute a  
13 denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988)." Given that  
14 the Nevada Supreme Court reviewed West's appeal for "failure to preserve potentially  
15 exculpatory evidence," West must first establish that the underlying factual determination  
16 that the video recording was "potentially exculpatory evidence" was unreasonable in light of  
17 the evidence presented in the evidentiary hearing. He has not. West has also failed to  
18 show that the Nevada Supreme Court's decision that he had not shown the State acted in  
19 bad faith or that he was prejudiced by the loss of the video recording was contrary to, or  
20 involved an unreasonable application of, *Youngblood*. Accordingly, West is not entitled to  
21 relief on his sixth ground for relief.

22 Ground Seven.

23 The exhausted claim alleged by West in Ground Seven is that his rights under the  
24 Confrontation Clause were violated by the presentation of hearsay evidence. As recited in  
25 his state post-conviction petition, the exhausted portion of Ground Seven rests on his  
26 assertion that "Detective Meade informed the jury he had received information from the Las



1 Vegas Metropolitan Police Department that a tipster had implicated Mr. West.” He further  
2 asserted that “the prosecutor and the lead detective provided compelling and highly  
3 prejudicial hearsay information against Mr. West.” He subsequently alleged that “the  
4 prosecutor and the lead detective provided the jury with blatant hearsay.” He asserts he  
5 “was not given an opportunity to confront the individual who allegedly ‘tipped off’ the  
6 metropolitan police department. Moreover, the anonymous silent witness allegedly  
7 provided information that was particularly devastating to Mr. West.” Absent from West’s  
8 state post-conviction petition, however, is any citation to the specific testimony of Detective  
9 Meade underlying this ground for relief, or to any specific statement made by the  
10 prosecutor to the jury.

11 To the extent West elaborates on the facts alleged in his state post-conviction  
12 petition in his present petition, he asserts that “during the trial the lead det [sic] Meade and  
13 dda [sic] White provided compelling and high prejudicial hearsay information against West  
14 from that CI Williams.” He further asserts the “prosecutor highlighted the anonymous  
15 tipster in his closing argument.”

16 The Court has reviewed the entirety of Detective Meade’s testimony, and cannot  
17 identify any testimony by Detective Meade that “he had received information from the Las  
18 Vegas Metropolitan Police Department that a tipster had implicated Mr. West.” In his  
19 closing arguments, the prosecutor stated “Detective Meade told you that he got tipped off  
20 that Mr. West was coming back in.” The “tip off” Detective Meade received, and to which  
21 the prosecutor was apparently referring, however, did not concern information from an  
22 informant implicating West. Rather, Detective Meade testified that he had communicated  
23 with the Las Vegas Metropolitan Police Department as a result of his efforts to develop  
24 West as a target “as somebody that may be involved in methamphetamine.” Detective  
25 Meade testified he had received a call from Carl Bomer, of the Las Vegas Metropolitan  
26 Police Department, and that as a result of this call, he contacted other police officers and

1 went to Highway 160 “in anticipation of Hyrum West returning back in to Pahrump from Las  
2 Vegas.” Detective Meade further testified that he had reason to believe West was coming  
3 back to Pahrump based on his conversation with Bomer.

4 West is not entitled to any relief on this seventh ground because the testimony of  
5 Detective Meade and the statement of the prosecutor, as recorded in the transcript of the  
6 trial, are contrary to his allegations. Detective Meade testified that he acted based upon a  
7 call he received from Bomer. Detective Meade’s testimony of his actions based upon a call  
8 that he received, which did not disclose the statement made by Bomer, was not hearsay  
9 evidence. (Further, contrary to West’s allegations, this phone call did not come from an  
10 informant implicating West, but from a police officer.) In addition, the prosecutor did not  
11 make a statement, during his closing argument, concerning a tip from an informant  
12 implicating West. Rather, he stated that Detective Meade acted on a tip that West was  
13 returning to Pahrump. The statement reflected Detective Meade’s testimony on cross-  
14 examination, when West elicited testimony that Bomer had said he (Bomer) had observed  
15 West’s vehicle driving toward Pahrump. Again, Detective Meade’s testimony was not  
16 hearsay. As with the Detective Meade’s earlier testimony regarding the call, this evidence  
17 of Bomer’s statements did not go to the truth of the matter asserted (that Bomer had  
18 observed West’s vehicle driving toward Pahrump) but to explain why Detective Meade  
19 called other officers and then went to Highway 160. Accordingly, West is not entitled to  
20 relief on the exhausted claim in his seventh ground for relief.

#### 21 Ground Eight

22 The exhausted claim alleged by West in Ground Eight is that, as he did not consent  
23 to the declared mistrial in his first trial, his second trial violated the Double Jeopardy  
24 Clause. West argues that, as he did not consent to the mistrial, the judge presiding at his  
25 first trial could declare a mistrial only if there was a “manifest neccissity” for doing so.  
26 Relying largely on Ninth Circuit and Nevada Supreme Court decisions, he argues there was

1 not such a “manifest necessity,” and therefore the judge abused his discretion in declaring  
2 a mistrial. In light of West’s arguments, the Court begins by noting that the Supreme Court  
3 has indicated the proper framing for such claims:

4 It is important at the outset to define the question before us. That question is  
5 not whether the trial judge should have declared a mistrial. It is not even  
6 whether it was an abuse of discretion for her to have done so—the applicable  
7 standard on direct review. The question under AEDPA is instead whether the  
determination of the Michigan Supreme Court that there was no abuse of  
discretion was “an unreasonable application of ... clearly established Federal  
law.” § 2254(d)(1).

8 *Renico v. Lett*, 559 U.S. 766, 772–73 (2010).

9 At the outset, the Court recognizes that the “clearly established Federal law”  
10 governing this §2254 petition is the “clearly established Federal law, as determined by the  
11 Supreme Court.” The Supreme Court provided a thorough summary of the relevant,  
12 “clearly established Federal law” governing a trial judge’s declaration of a mistrial on the  
13 grounds that the jury is deadlocked.

14 The “clearly established Federal law” in this area is largely undisputed.  
15 In *Perez*, we held that when a judge discharges a jury on the grounds that the  
16 jury cannot reach a verdict, the Double Jeopardy Clause does not bar a new  
17 trial for the defendant before a new jury. We explained that trial judges may  
18 declare a mistrial “whenever, in their opinion, taking all the circumstances into  
consideration, there is a manifest necessity for doing so.” The decision to  
declare a mistrial is left to the “sound discretion” of the judge, but “the power  
ought to be used with the greatest caution, under urgent circumstances, and  
for very plain and obvious causes.”

19 Since *Perez*, we have clarified that the “manifest necessity” standard  
20 “cannot be interpreted literally,” and that a mistrial is appropriate when there  
21 is a “high degree” of necessity. The decision whether to grant a mistrial is  
reserved to the “broad discretion” of the trial judge, a point that “has been  
consistently reiterated in decisions of this Court.”

22 In particular, “[t]he trial judge’s decision to declare a mistrial when he  
23 considers the jury deadlocked is ... accorded great deference by a reviewing  
24 court.” A “mistrial premised upon the trial judge’s belief that the jury is unable  
to reach a verdict [has been] long considered the classic basis for a proper  
mistrial.”

25 The reasons for “allowing the trial judge to exercise broad discretion”  
26 are “especially compelling” in cases involving a potentially deadlocked jury.  
There, the justification for deference is that “the trial court is in the best

1 position to assess all the factors which must be considered in making a  
2 necessarily discretionary determination whether the jury will be able to reach  
3 a just verdict if it continues to deliberate." In the absence of such deference,  
4 trial judges might otherwise "employ coercive means to break the apparent  
deadlock," thereby creating a "significant risk that a verdict may result from  
pressures inherent in the situation rather than the considered judgment of all  
the jurors."

5 This is not to say that we grant absolute deference to trial judges in  
6 this context. *Perez* itself noted that the judge's exercise of discretion must be  
7 "sound," and we have made clear that "[i]f the record reveals that the trial  
8 judge has failed to exercise the 'sound discretion' entrusted to him, the  
9 reason for such deference by an appellate court disappears." Thus "if the trial  
judge acts for reasons completely unrelated to the trial problem which  
purports to be the basis for the mistrial ruling, close appellate scrutiny is  
appropriate." Similarly, "if a trial judge acts irrationally or irresponsibly, ... his  
action cannot be condoned."

10 We have expressly declined to require the "mechanical application" of  
11 any "rigid formula" when trial judges decide whether jury deadlock warrants a  
12 mistrial. We have also explicitly held that a trial judge declaring a mistrial is  
13 not required to make explicit findings of " 'manifest necessity' " nor to  
14 "articulate on the record all the factors which informed the deliberate exercise  
15 of his discretion." And we have never required a trial judge, before declaring a  
mistrial based on jury deadlock, to force the jury to deliberate for a minimum  
period of time, to question the jurors individually, to consult with (or obtain the  
consent of) either the prosecutor or defense counsel, to issue a supplemental  
jury instruction, or to consider any other means of breaking the impasse.

16 *Left*, 559 U.S. at 773–75.

17 The Nevada Supreme Court's decision, while terse, establishes that it did not  
18 unreasonably apply the law as established by the Supreme Court. That court noted that  
19 trial judge determined "the jury foreman stated that the last poll was eight-four, the jury was  
20 hopelessly deadlocked, and further deliberation would not be helpful." It further noted that  
21 "a deadlocked jury is the classic example of the 'manifest necessity' for mistrial." The  
22 Nevada Supreme Court's determination was not objectively unreasonable. Accordingly,  
23 West is not entitled to relief on the exhausted Double Jeopardy Clause claim in his eighth  
24 ground for relief.  
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1       Ground Nine

2       West's exhausted claim, in his ninth ground for relief, is that his appellate counsel  
3 was ineffective for failing to assert, as an issue in his direct appeal, that the judge presiding  
4 at the second trial violated the "law of the case" by refusing to read two of West's jury  
5 instructions that were given to the jury in his first trial.

6       A criminal defendant is entitled to reasonably effective assistance of counsel.  
7 *McMann v. Richardson*, 377 U.S. 759, 771, n. 14 (1970). The right to effective assistance  
8 of counsel is the right of the accused to require the prosecution's case to survive the  
9 crucible of meaningful adversarial testing. *Strickland v. Washington*, 466 U.S. 668, 685  
10 (1984). When a true adversarial criminal trial has been conducted, even if defense counsel  
11 has made demonstrable errors, the requirements of the sixth amendment have been met.  
12 *United States v. Cronin*, 466 U.S. 648, 656 (1984). Counsel is presumed competent. As  
13 such, the burden rests on the defendant to establish a constitutional violation. *Cronin* at  
14 658.

15       To obtain reversal of a conviction, petitioner must prove (1) that counsel's  
16 performance was so deficient that it fell below an objective standard of reasonableness,  
17 and (2) that counsel's deficient performance prejudiced the defense to such a degree as to  
18 deprive the defendant of a fair trial. *Strickland*, 466 U.S. at 687-88, 692 (1984). To  
19 establish deficient performance under *Strickland*, it must be shown "that counsel made  
20 errors so serious that counsel was not functioning as the 'counsel' guaranteed the  
21 defendant by the Sixth Amendment. *Id.* at 687. Exercising highly deferential judicial  
22 scrutiny, *Id.* at 699, this court inquires "whether counsel's assistance was reasonable  
23 considering all the circumstances." *Id.* at 688. "Such assessment must be made 'from  
24 counsel's perspective at the time,' so as 'to eliminate the distorting effects of hindsight.'"  
25 *Silva v. Woodford*, 279 F.3d 825, 836 (9<sup>th</sup> Cir. 2002) (citing *Strickland*, 466 U.S. at 689).  
26 Prejudice can be presumed only "where there has been an actual breakdown in the

1 adversarial process at trial.” *Toomey v. Bunnell*, 898 F.2d 741, 744 n. 2 (9th Cir.), *cert.*  
2 *denied*, 111 S.Ct. 390 (1990); *See also Cronic, supra*.

3 Appellate counsel does not have a constitutional obligation to raise every  
4 nonfrivolous issue requested by the appellant. *Jones v. Barnes*, 463 U.S. 745, 751 (1983).  
5 “Experienced advocates since time beyond memory have emphasized the importance of  
6 winnowing out weaker arguments on appeal and focusing on one central issue if possible,  
7 or at most on a few key issues.” *Id.* at 751-52.

8 The underlying premise of West’s ninth ground for relief is that the second trial court  
9 was bound by the “law of the case” to give the same jury instructions as given in the first  
10 trial. West’s concept of “the law of the case” is contrary to Nevada law. In Nevada, the  
11 “law of the case” requires only that lower courts follow appellate court rulings in the same  
12 case. *Hsu v. Cty. of Clark*, 173 P.3d 724, 728 (Nev. 2007). West’s appellate counsel was  
13 not ineffective for failing to assert, in the direct appeal, that the second trial judge violated  
14 the law of the case by not following a ruling of the first trial judge.

#### 15 Ground Ten

16 In his tenth ground for relief, West argues his appellate counsel was ineffective for  
17 failing to challenge the reasonable doubt instruction given to the jury. Courts have,  
18 however, consistently and repeatedly held that the instruction given by trial judge  
19 appropriately describes the state’s burden of proof regarding reasonable doubt.  
20 Accordingly, counsel was not ineffective for failing to raise this issue on direct appeal.

#### 21 Ground Eleven

22 In his eleventh ground for relief, West alleges he was deprived of the assistance of  
23 counsel. In sparse and vague allegations, he argues his counsel suggested or instructed  
24 West to represent himself, such advice resulting from counsel’s effort to avoid sanctions  
25 threatened by the prosecution. The threatened sanctions, West suggests, created an  
26 actual conflict of interest in counsel, forcing West to represent himself. West does not

1 challenge the trial court's canvas, in which the court determined West's election to  
2 represent himself was knowing and voluntary. The Nevada Court of Appeals denied West  
3 relief on this issue, finding that "West failed to support this claim with sufficient facts that, if  
4 true, entitled him to relief." Accordingly, to obtain relief, West must show was that this  
5 decision was "based on an unreasonable determination of the facts in light of the evidence  
6 presented in the State court proceeding." He has not done so, and could not do so  
7 because the record is contrary to his vague allegations.

8       The Sixth Amendment right to effective assistance of counsel includes the right to  
9 representation free from conflicts of interest. *Mickens v. Taylor*, 535 U.S. 162, 166 (2002);  
10 *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980). It is insufficient to show a mere "possibility  
11 of conflict." *Cuyler*, 446 U.S. at 351. Rather, to demonstrate a conflict of interest for Sixth  
12 Amendment purposes, a petitioner must show his counsel operated under an "actual  
13 conflict" that "adversely affect[ed] counsel's performance." *Mickens*, 535 U.S. at 172.  
14 Potentially divided allegiances do not constitute active representation of conflicting  
15 interests. *Paradis v. Arave*, 130 F.3d 385, 391 (9th Cir. 1997). Speculation will not  
16 substitute for evidence. *Morris v. California*, 966 F.2d 448, 456 (9th Cir. 1992). If a  
17 petitioner demonstrates counsel "actively represented conflicting interests" and that "an  
18 actual conflict of interest adversely affected his lawyer's performance," prejudice to the  
19 petitioner is presumed. *Cuyler*, 446 U.S. at 350. In such cases, the defendant need not  
20 satisfy the "prejudice" prong of the *Strickland* analysis. *Id.*; *Strickland*, 466 U.S. at 692. The  
21 United States Supreme Court has limited application of the *Cuyler* standard and exception  
22 to cases involving multiple concurrent representation of defendants. *Mickens*, 535 U.S. at  
23 174-175 (holding the language in *Cuyler* does not "clearly establish, or indeed even  
24 support" applying *Cuyler* beyond joint representation cases); see also *Earl v. Ornoski*, 431  
25 F.3d 1158, 1185 (9th Cir. 2005) (recognizing for AEDPA purposes that "the Supreme Court  
26 . . . has expressly limited its constitutional conflicts jurisprudence" to joint representation

1 cases"). Any other conflict case must satisfy both prongs of the ineffective assistance of  
2 counsel standard in *Strickland. Id.*; see also *Bragg v. Galaza*, 242 F.3d 1082, 1086-90 (9th  
3 Cir. 2001).

4 The record establishes that West's counsel was not jointly representing any co-  
5 defendants. Accordingly, West must both show that his counsel otherwise had a conflict of  
6 interest and that such conflict prejudiced West's defense.

7 The record establishes the context for West's decision to represent himself and  
8 establishes that his counsel did not have a conflict of interest. As demonstrated through  
9 the present petition, from the outset of the state's prosecution West has argued and  
10 continues to argue that the search of his vehicle was improper. The issue was litigated,  
11 and decided adverse to West, in pre-trial motions prior to the first trial. Despite those  
12 rulings, during the first trial defense counsel pursued a defense theory that (a) the search  
13 of West's vehicle was improper, (b) the jury could decide whether the search was improper,  
14 and (c) if the jury so found, it must not consider the evidence seized during the search.  
15 Consistent with this defense theory, counsel requested and obtained two instructions. The  
16 first, Instruction 19, instructed the jury that if it concluded the vehicle was searched  
17 "pursuant to the 'search incident to arrest' exception to warrantless searches, the jury "must  
18 find that the search was improper" and disregard all evidence seized. The second,  
19 Instruction 20, instructed the jury that the voluntariness and scope of a consent to search  
20 are questions of fact, and that if the jury found "the search was improper" it must disregard  
21 all evidence seized. In response to the decision of the first trial court to give these  
22 instructions to the jury, the state requested and obtained Jury Instruction 22: that the court  
23 had already determined that the search of the vehicle was legal and constitutional. During  
24 jury deliberations, the jury requested clarification of Instruction 19 as it conflicted with  
25 Instruction 22 that court had determined the search was legal and constitutional.  
26



1 Prior to the second trial, the state moved to preclude the defense from again  
2 pursuing its theory that the jury could decide the legality of the search of West's vehicle.  
3 The state argued that not only were the jury instructions in the first trial in conflict and  
4 caused the deadlocked jury but that the defense theory was contrary to well-established  
5 law. The state concluded that the legality of the search, and the admissibility of the  
6 evidence, were not only issues for the court to decide but those issues were decided by the  
7 court adverse to West prior to the first trial. West, through his counsel, opposed the  
8 motion. The second trial judge granted the motion in limine. As indicated by West's  
9 allegation that his counsel was going to alter the theory of defense to avoid the imposition  
10 of sanctions, counsel apparently conveyed to West that he would abide by the court's  
11 ruling. Counsel's decision to abide by a ruling of the court neither created a conflict of  
12 interest nor forced West to represent himself. Given that the record is contrary to West's  
13 vague allegations, he has not shown that the Nevada Appellate Court unreasonably  
14 determined that he had not supported his claim that counsel had a conflict of interest with  
15 sufficient facts to entitle him to relief. Accordingly, West's eleventh ground for relief is  
16 without merit.

17 Ground Twelve

18 In his twelfth ground, West argues he is entitled to relief because the cumulation of  
19 errors. The Nevada Supreme Court rejected this claim. That ruling was neither contrary to  
20 clearly established federal law nor an unreasonable determination of the facts presented in  
21 the record.

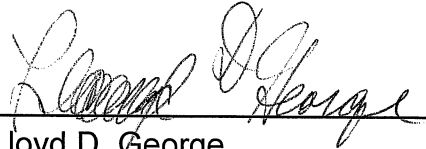
22 Therefore, for good cause shown,

23 THE COURT **ORDERS** that Hyrum West's Motion for Extension of Time (ECF No.  
24 71) to file a reply to the respondent's answer is GRANTED; The Court has considered  
25 West's reply, filed at ECF No. 72, as timely filed and has considered the arguments raised  
26 in that reply in determining his petition for relief.

1 THE COURT FURTHER **ORDERS** that Hyrum West's Motion for Appointment of  
2 Counsel (ECF No. 73) is DENIED;

3 THE COURT FURTHER **ORDERS** that Hyrum West's Amended Petition Pursuant  
4 to 28 U.S.C. §2254 (ECF Nos. 33 & 34) is DENIED. The Clerk of the Court shall enter a  
5 judgment denying West's Amended Petition.

6  
7  
8 DATED this 23 day of January, 2020.

  
Lloyd D. George  
United States District Judge